UPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 805.

ARTHUR LEE RANEY, et al.,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE GOULD SCHOOL DISTRICT,
a Public Body Corporate, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

QUESTIONS PRESENTED.

The first Question Presented as stated by petitioners is:

> 1. Whether the court of appeals erred in denying all relief, dismissing the complaint, and declining to order the district court to supervise the desegregation process on the ground that the school board was acting in good faith and the Department of Health, Education and Welfare had initially approved the board's plan as facially sufficient to comply with Title VI of the Civil Rights Act of 1964.

The court of appeals affirmed dismissal of the complaint by the district court based on the finding by both courts that petitioners had failed to sustain the burden of proof

on the issues joined in, and tried by, the district court, and the finding by both courts (on substantial evidence), that respondents were proceeding in good faith to desegregate the district.

The petitioners set out the second Question Presented as follows:

> 2. Whether—13 years after **Brown v. Board of Education,**—a "choice" plan which maintains an all-Negro school is constitutional in a system with only two nearby school plants, one traditionally Negro and the other traditionally white, although assigning elementary grades to one school and secondary grades to the other is a feasible alternative assignment method which would immediately desegregate the system.

This question was not raised in the district court. The issue tried in that court was whether it could and should require a proposed school building to be built on a particular site because of the effect of such construction on the desegregation of the school district (A. 21). It decided it could do so, but that the evidence did not warrant such action in this instance (A. 24).

The court of appeals rejected the argument of these petitioners that it should order a redistribution of students within the school system, specifying what grades should be taught at each school, because that question (like the one petitioners seek to present here) was raised for the first time on appeal (A. 144). Therefore there is no factual basis in this record for the assumption incorporated in this question that the redistribution of students proposed by petitioners "is a feasible alternative assignment method."

CONSTITUTIONAL PROVISION INVOLVED.

This case involves Section I of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT.

In this suit a small and impoverished rural school district has been required to defend against a different challenge to the conduct of its educational program at every phase of the litigation. When the suit was filed in September, 1965, the principal charge was that the high school attended only by Negroes was inadequate and should be improved (A. 6-7). When the case was tried in November, 1965, the claim was that the proposed building to replace this admittedly inadequate high school should be built on a site other than the one selected by the school authorities.[1] In the court of appeals petitioners sought a comprehensive redistribution of the students and reorganization of the school system. That court said (A. 144):

> "Upon appeal, plaintiffs again altered their position and urged that the Board be restrained from using the new building construction as a replacement for the Field High School and that instead, the building be converted into a unit of a completely integrated grade school. The issue last stated is raised for the first time upon appeal and was not presented to the trial court and no opportunity was afforded the parties to offer evidence on the feasibility of such a

[1] Illustrating that this was the only issue petitioners undertook to present to the district court is the first paragraph of their trial memorandum presented about three weeks after the trial:

> "Plaintiffs respectfully submit the following Memorandum on the issue of whether the Court has authority to direct defendant Board of Education of the Gould School District No. 1 to locate and construct new school facilities which the Board proposes to construct in a way to encourage, rather than discourage, school desegregation. The issue, more simply put, is can, or perhaps should, the Court order the Gould school district to build its proposed new high school facilities on one particular site rather than another."

plan, nor was the trial court given any opportunity to pass thereon. It is fundamental that issues not presented to or considered by the trial court cannot be considered on appeal."

In this Court petitioners now acknowledge that there is no factual basis in the record for the relief they sought in the court of appeals, and ask that the case be remanded "in order that the feasibility" of their proposed reorganization of the school system can be tried in the courts below (p. 23).

Petitioners have claimed that every stage of the proceedings that respondents are so hostile to Negroes that they can not be trusted to perform their duties and that the federal courts must therefore exercise the administrative discretion that is vested by law in the local authorities. Their position in the court of appeals was set out in this language at page 19 of their brief filed there:

> "The degree of inequality between Negro and white high schools which has been maintained by the Gould School District since 1954, despite a court judgment requiring their equalization, suggests that the board is so totally committed to victimizing the Negro community that it could not be expected to administer a 'freedom of choice' plan fairly even under a court order."

In response to this extravagant claim the court of appeals concluded:

> "The record fairly shows that the integration plan has operated smoothly and that the Negro students have been encouraged to elect the white school" (A. 150).
>
> • • • • • • •
>
> "Additionally, we find no substantial evidence to support the finding that the Board was not proceeding to carry out the plan in good faith" (A. 151).

Examination of the record clearly reveals why the courts below agreed that respondents had demonstrated their good faith commitment to discharge their legal obligations and that there was no reason to impose the further burden of perpetual litigation on a school district already severely hampered by insufficient funds.

This is a small rural school district with a ratio of about two Negro students for each white student (A. 80). The economy is primarily agricultural, and there is no industry in the district (A. 78). The Arkansas State Penitentiary lies wholly within the district, and removes some twenty thousand acres from the ad valorem tax base (A. 78). The cumulative result of these factors is that the district has grossly inadequate revenues to the extent that in the five or six years before the trial the district ended the year with an operating deficit (A. 98).

The building housing Gould Elementary School was originally built in 1947 at a cost of $81,950 as a high school, and the building housing Gould High School was erected in 1964 with proceeds from insurance policies when the existing building burned. The insurance proceeds were about $98,000 and were entirely exhausted by the new building (A. 82-3). These buildings, and the other buildings on this site used for school purposes, are marked with many inadequacies when measured by any contemporary standard (A. 82-88).

The Field Elementary School was built in 1954 at a cost of $45,700, a gymnasium and auditorium was added in 1960 for $82,400 and two additional classrooms were added in 1965 for $9,700 (A. 89-90). This is an entirely satisfactory educational facility (A. 91).

The Field High School concerning which complaint was made was conceded by respondents to be an inadequate structure, and it has been planned to replace it as soon as funds for that purpose were available. At the time of trial

it was expected that within the legal restrictions on the district's bonded indebtedness construction on the new high school could begin in 1967 and the building could be ready for occupancy in the Fall of 1967 (A. 65).[2]

Petitioners suggest that for many years prior to the completion of the construction program that culminated with the replacement of Field High School respondents intentionally maintained unequal facilities for the Negro students. In this connection it is noted that all of the construction funds expended by the district since 1954 have been on facilities used exclusively by Negro students except the insurance proceeds with which a burned building on the Gould School campus was replaced, and further that at the time of the trial all of the construction money to become available in the foreseeable future was earmarked for like use.

The date 1954 is referred to by petitioners in connection with their claim of unequal facilities because they seek to charge that respondents have been subject to a court order "in a suit to require equal facilities for Negroes" since that date. Petitioners' brief, p. 5. There is no proof whatever of this. The Superintendent knew nothing of any prior suit, and found nothing relating to such a suit in the district's records (A. 107-8). The president of the school board, who with eight years on the board was the senior member in point of service, knew nothing about such a suit (A. 121). A witness on behalf of plaintiffs gave an unintelligible answer about her knowledge of such a suit (A. 131), and no judgment or court order was ever introduced.

The president of the board fairly summarized the facts in the record pertaining to the physical plant in his testi-

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[2] During the long pendency of this litigation the new building was constructed on the time schedule that respondents projected during the trial. Petitioners' brief, p. 5.

mony that when the proposed high school building on the Field campus was constructed that facility for grades one through twelve would be more modern and far superior to that on the Gould campus (A. 125-6). This issue concerning the physical facilities was the central one at the trial, and the vast majority of proof on both sides was directed to it. The unimpeachable decision of the district court on it was:

> "Therefore, it appears that the defendant school board realized the need for a new school building and is doing all that it is financially able to do toward filling this need" (A. 17).

The respondents' good faith is not demonstrated alone by the application of all available construction funds since 1954 for the modernization of the physical plant used by Negro students. This district moved promptly to comply with the Civil Rights Act of 1964, and in a display of utmost good faith submitted a desegregation plan to H. E. W. providing for a much more rapid rate of desegregation than was required by the Regulations of that Department. Unlike most school districts of the South, the majority of which chose to desegregate over a period of 3 years (as they had a right to do under the Regulations) this district elected to fully desegregate all twelve grades the first year.

The exercise of free choice by Negro students resulted in overcrowding three grades at the Gould campus. When this occurred, respondents sought counsel from H. E. W. which suggested limiting the number of Negro students whose choices would be honored in the overcrowded grades (5, 10 and 11) to the physical capacity of the facility for 1965-66 only (A. 53-5). Respondents, acting on that advice, honored all requests for assignment in the nine other grades, and honored twelve such requests for the overcrowded grades. This resulted in rejecting, for the

1965-66 school year alone, the choice of assignment of a total of 28 children in grades 5, 10 and 11 (A. 95).

The resulting assignments placed 71 Negro students with 299 white students at the previously all white school (A. 79-80). The record reflects the success of the respondents' plan of desegregation. The Negro students were accepted as members of the Gould school's athletic teams (A. 99-100), and several in each class earned enrollment on the honor roll (A. 100).[3]

The Board president summarizes the success of the desegregation plan in operation (A. 123):

> "Q. As far as the educational programs' conduct on the school properties in the District, has the plan proceeded satisfactorily? A. We have had wonderful cooperation out of the white people and the colored people. I'd say that we have got ninety-five percent of the cooperation out of both sides. And the Board as a whole—if I might elaborate just a little—has gone out of our way in going to athletics—not just the Board, but all the people, to go to our athletic program, or any social functions and to discourage any violence or any nagging, or anything of that nature, not only with the white patrons, but the colored patrons, we've had wonderful cooperation. We've got a small minority that's not interested in our schools or our people or our economy or our welfare that don't even have kids. We haven't had any trouble out of people that's got kid's that's going to school—colored or white. We've had wonderful cooperation out of them."

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[3] This fact is also significant on the general but unsupported claim that respondents had afforded inferior educational opportunities to the Negro students. If such had been the case they would not have been able to compete so well on entering the previously all white school.

That the board voluntarily chose to desegregate in one year instead of three (and the testimony of the Superintendent (A. 102) and of the president (A. 122) pertaining to why it did so), and that the program was immensely successful, although it challenged traditions and customs of well over a century is persuasive rebuttal to the unsupported assertion of petitioners that these people are bent on "victimizing" the Negro community.

It would unduly enlarge this brief to discuss each alleged disparity between the schools mentioned by petitioners. It was established at the trial that respondents were already using all available funds to correct the genuine deficiencies, i. e. to replace Field High School and to eliminate differences in teacher salary scales. Virtually all of the other differences between the various schools in the district simply reflect that it is impossible to maintain any two schools so they are identical in every respect. Moreover, many of the differences such as broader curriculum offerings (A. 53) and better academic credentials of teachers (A. 94-5) place the advantage at the Field schools, not those that were previously attended only by white students.

However several of the claims made by petitioners do require response. They assert that it was "the practice to require Negro students to pick cotton in the fields during class time to earn money for school fund raising projects, and to pay enrollment fees." Petitioners' brief, p. 7. The proof in the record affords no basis for the evil and ulterior overtones with which the respondents clothe the cotton picking practice. Superintendent Sage testified (A. 98-9):

> "Q. This cotton-picking situation has been mentioned, Mr. Sage, would you tell the Court what you know about the cotton-picking situation? A. As long as I can remember, it has been the custom at each

school, the Gould as well as the Field School, for different classes to have fund-raising projects to buy something for the use of the class, and they have money-raising activities for those purposes and I assume that this cotton-picking is one of the ways that the students at the Field High used to raise money for their classes.

Q. Is that a type of project—that is cotton-picking—that has been employed by the students at the Gould high school? A. Yes.

Q. Do they do that during school hours or on Saturdays and after school? A. On Saturdays and after school.

Q. Are there other similar projects some classes use instead of cotton-picking for money? A. Yes, car washes.

Q. Let me ask you this, is this a voluntary program whenever a class wants to do it, or is it mandatory? A. It's voluntary."

The withdrawal of permission to hold P. T. A. meetings on the Fields school property, and obtaining an injunction against "protesting" by respondents are cited as evidence of their hostility to Negroes. This is discussed under the caption "Intimidation" in petitioners' brief, pp. 9-10.

Irresponsible charges of intimidation were also made in the complaint, and in a motion for a preliminary injunction (not printed in the record—see docket entries A. 1). When the time came for proof on these allegations, plaintiffs dismissed their suit against the accused Chief of Police (A. 28), and then abandoned the announced intent to call witnesses to such charges against the school administrative staff (A. 120).

The P. T. A. matter arose when that organization was taken over by non-members (A. 116), undertook to

carry out political objectives (A. 101), and sponsored public demonstrations including picketing of the Federal Building at Little Rock (A. 108-9). No other group is permitted to use school property for political rallies (A. 101), and respondents are certainly in the proper discharge of their duties to deny such use to any organization even if it calls itself a P. T. A.

As to the injunction obtained in a suit brought by some of the respondents to restrain what petitioners characterize innocently as "protesting", the record shows that its reach was to stop "mass demonstrations or picketing in the vicinity of Gould High School" (A. 63). Certainly no unfavorable conclusion can be drawn concerning the motives of public officers charged with the operation of a school system because they resort to the courts to preserve the public peace around the school property.

Perhaps the best illustration in the testimony of the genuine concern of the respondents for the welfare of all the students in the district, and the complete absence of the racial hostility suggested by petitioners, is the testimony of the Negro principal of Fields school (A. 118):

> "Q. In that capacity, have you had occasion to work regularly with Mr. Sage and with the members of the Gould School Board? A. I have.
>
> Q. Have you found them interested in, and cooperative with, the program you had in your schools? A. One hundred percent.
>
> Q. Have you found them willing to donate personally from their own pockets for the projects you had in those schools? A. Yes, sir.
>
> Q. Every one of them? A. Every one."

The record fairly reflects that respondents voluntarily initiated a desegregation plan in 1965. Except for a few

students whose right to choose their school was delayed for one year due to overcrowding, every student in the district was given the unrestricted right to select his school.[4] We will demonstrate that the method of school assignment selected by respondents not only protects the constitutional rights of all concerned, but also that it is the method best calculated to preserve the educational integrity of the school system in this district.

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[4] The record does not reflect the operation of the plan in years subsequent to 1965. However, petitioners have placed before the Court considerable data concerning such operations (Petitioners' brief, pp. 4-5) and we suggest that the Court can safely conclude that the unrestricted annual choice provided for all students by the plan has, in fact, been honored or petitioners would certainly have included that information along with their other materials from sources outside of the record.

SUMMARY OF ARGUMENT.

I. Both of the courts below found that the defendants were discharging their constitutional obligations in good faith, and that they were already administering a constitutionally adequate desegregation plan at the time suit was brought. In view of these findings the district court correctly dismissed the complaint. That court had no obligation to retain the case on its docket to supervise the operation of this school district in perpetuity. This Court's direction that the district courts retain jurisdiction in the cases being remanded in **Brown v. Board of Education**, 349 U. S. 294, does not suggest such a procedure in every case involving school desegregation. It implied only that the district courts would retain such cases for so long as the circumstances indicate a need for judicial supervision. In cases like this one where the circumstances make appropriate a final judgment then **Brown** does not inhibit that disposition.

II. Although it presents an issue not presented to, or decided by, the courts below, we will discuss the issue raised by the second Question Presented by petitioners. That question is whether a freedom of choice method of student assignment is constitutionally permissible if the choices made pursuant to it do not result in some sort of balance in the racial composition in each school.

A. This Court has never held that public officials have a constitutional duty to mix or balance the races in the public schools. **Brown** condemned only state-enforced racial segregation. This Court's subsequent decisions reaffirm that principle, but give no support to the proposition that the Constitution requires school authorities to manipulate assignments in order to maximize racial mixing.

B. In carefully reasoned opinions the lower federal courts have been virtually unanimous in concluding that while the Constitution prohibits racial discrimination in school assignment, it does not command integration. It simply condemns race as a criterion for school assignment. The court of appeals of every circuit where there has been significant litigation pertaining to school desegregation, including the First, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits, has so construed the Constitution and **Brown**. The recent decision of the Court of Appeals for the Fifth Circuit[5] overruling a long line of its own decisions is demonstrably in error. It rests on the unsound assumption that the Civil Rights Act of 1964 and the desegregation guidelines thereafter published by H. E. W. enlarged the Fourteenth Amendment's prohibition against state-imposed racial discrimination. To the contrary, however, the Act adopted as national policy prior court decisions squarely holding that state authorities are under no duty to achieve racial balances, or alter racial imbalances, in the schools, and the so-called guidelines are valueless as aids to a court in construing the Constitution.

C. Both the express language and legislative history of the Civil Rights Act of 1964 make it clear that it created no duty to racially balance the public schools, or to alter racial imbalances. It was the express intent of Congress to adopt, and thus confirm as national policy, the interpretation of the Constitution in **Bell v. School City of Gary, Ind.**, 214 F. Supp. 819 (N. D. Ind., 1963), aff'd. 324 F. 2d 209 (7 Cir., 1963), cert. den., 377 U. S. 924. That decision held that a school was "segregated" in the constitutional context if a student were excluded from it, or compelled to attend it, because of his race. It also ex-

[5] **United States v. Jefferson County Board of Education**, 372 F. 2d 836 (5 Cir., 1966), **on rehearing en banc** 380 F. 2d 385 (5 Cir., 1967), cert. den. 19 L. Ed. 2d 103, 104.

pressly held that whether a school was "segregated" was not to be determined, when measuring constitutional rights, by mathematical formulas applied to the racial composition of the school.

The continuing intent of Congress that no federal official should take any action requiring local school authorities to overcome racial imbalances was manifested in the 1966 amendments to the Elementary and Secondary Education Act of 1965 in which such officers were prohibited from requiring "the assignment or transportation of students or teachers in order to overcome racial imbalance." 80 Stat. 1212, 20 U. S. C. 242 (a).

The validity of H. E. W. guidelines, upon which the Fifth Circuit Court relied in **Jefferson County**, has not been assessed by any court based on a record made in the usual adversary process. A three judge district court before which that issue had been fully tried regarded the issue foreclosed to it by the **Jefferson County** decision. Counsel representing the Secretary of H. E. W. and the United States Commissioner of Education have successfully avoided a judicial appraisal of the guidelines in two other suits challenging their validity. However, they have been held to be illegal by a Hearing Examiner before whom the issue was developed during the course of H. E. W. administrative hearings. Moreover, the Appropriations Committee of the House has reported that the requirements of the guidelines go "beyond the law," and the Senate Appropriations Committee has reported "that the revised education guidelines contravene and violate the legislative intent of Congress in the enactment of the Civil Rights Act of 1964."[6]

The question of the validity of the guidelines is subject to sufficient doubt that this Court should not accept them

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[6] H. R. Rep. No. 271, 90th Cong., 1st Sess. 44 (1967). S. Rep. No. 1631, 89th Cong., 2d Sess. 71-73 (1966).

as establishing any sort of "minimum standards" for measuring the constitutionality of conduct as suggested by petitioners.

D. The freedom of choice method of school assignment affords the fullest possible exercise of a right that this Court has held to be secured by both the Fifth and Fourteenth Amendments—the right of a parent to direct the upbringing and education of his children. **Pierce v. Society of Sisters,** 268 U. S. 510; **Farrington v. Tokushige,** 273 U. S. 290. It does not impose a burden on the individuals affected as petitioners argue, but represents the *fullest possible departure from assignment of students on* a racial basis. As the brief of the United States as amicus curiae filed in 1952 in **Brown** said at page 23:

> "Segregation imposed by law is an interference with the right of an individual to exercise a voluntary choice as to those with whom he will associate. To remove such an interference is to enlarge individual freedom, not to limit it. 'Commingling' between white and colored persons can then result as the product of voluntary choice."

This Court's approval of the freedom of choice assignment procedure is strongly suggested in **Goss v. Board of Education,** 373 U. S. 683, and **Calhoun v. Latimer,** 377 U. S. 263, and the lower federal courts have been almost unanimous in holding it to be a constitutionally permissible method of school assignment and thus one that is within the discretion of the local school authorities to select.

The alternative method of assignment suggested by petitioners would deny to the parents of both Negro and white students a choice of the school their children will attend. They argue that the choice must be withheld because, when given a choice, most white children do not choose to attend a predominantly Negro school, and a sufficient number of Negro students choose to attend a

school with members of their own race that there continues to be predominantly Negro, or all-Negro, schools.

The pattern of voluntary racial association in this country is ample evidence that many, if not most, of its citizens of both races do not want the right to attend school with members of their own race sacrificed. Counsel for petitioners do not speak for all Negro citizens, and have no standing to "waive" their constitutional rights however persuaded they may be that the result would be beneficial.

This argument that Negro and white parents alike don't know what is best for their children when they choose to send them to schools with members of their own race, and that this Court must therefore adopt a rule of constitutional law that denies them the opportunity to make such a choice, demonstrates its own absurdity Individual constitutional liberties are not preserved by transferring decisions theretofore belonging to the individual to the school authorities, the courts, or any other governmental agency.

When left entirely to their own volition the American people tend to congregate in a multitude of groups, and prominent among them are racial groups. Throughout the nation the vast majority of both Negro and white students attend schools in which their own race predominates, and the proportion of students that have elected to do so in the Gould School District is not dissimilar to the proportion that has done so elsewhere in the country.

To the extent that there is a racial separation in this school district, it is purely voluntary. Voluntary racial separation offends no law or national policy. The Constitution does not prohibit the free choice of individuals and groups to select their associates; it secures their right to do so.

E. Experience, and official government surveys, prove that when the proportion of Negro students in a school

approaches 50% it tends to convert quickly to an all-Negro school. This is caused by the withdrawal of white students by parents who are unwilling to have their child in a school where the dominant culture is so different from their own. This phenomenon makes manipulation of school assignments in an effort to achieve a racial balance self-defeating. In Washington, D. C., Chicago, and virtually every other metropolitan area in the country with substantial Negro population, the white students have fled to the suburbs and private schools when confronted by assignment to a school where they would be in the minority.

This pattern has not yet developed in the southern and border states where there are hundreds of school districts with a majority or substantial minority of Negro students because the freedom of choice assignment procedure has only infrequently resulted in white students being confronted with mandatory assignment to a predominantly Negro school. However in those instances where this has occurred the result was the same as experienced in the northern cities.

Since there are about two Negro students for each white student in this school district, the procedure suggested by petitioners as a "feasible alternative" to freedom of choice would result in both schools being predominantly Negro if the white students continued to attend them. However, most if not all would be withdrawn. Although desegregation is an accomplished fact in this district, and every white child is attending a school where Negro students exceed 20% of the student body, the white parents in Gould would be no more willing than those in Chicago, Washington or New York to send their children to predominantly Negro schools.

Withdrawal of the white students from the public schools would produce in Gould—as it has elsewhere—im-

measurable harm to all concerned. The Constitution does not mandate this result.

Respondents accept without reservation their obligation to comply with the Constitution as construed in **Brown**. However, that decision does not require that they abandon an assignment procedure that assures every child admission to the school of his choice in favor of one that would greatly damage, if not destroy, the public schools of this community.

ARGUMENT.

I.

The District Court Correctly Dismissed the Complaint When the Proof at Trial Established That Respondents Had Voluntarily Undertaken a Program of Desegregation and Were Proceeding to Administer It in Good Faith.

Petitioners' Question No. 1 presents the issue of whether plaintiffs in cases relating to school desegregation are entitled to keep every such case on the district court docket in perpetuity notwithstanding the judicial determination that the defendants are discharging their constitutional obligations in good faith. It is asserted that although both lower courts so found in this case, the suit should have been retained on the district court docket so that it could "supervise the desegregation process" (Petitioners' brief, p. 12). Implicit in the petitioners' argument is the assumption that continuing judicial supervision is necessary in every case purporting to have any connection with school desegregation in order to insure that constitutional rights are protected, without regard to whether there is any merit to the allegations of constitutional misconduct of the defendants. Such a proposition has no rational support and, if adopted, would soon result in the district courts supervising the operation of every school district in the nation where any patron conceives some act of the local school authorities to violate his constitutional rights. As the court of appeals said in the case at bar (A. 151):

> "Courts are not equipped to solve the everyday problems of school operation. The court's interference with the Board's operation of its school is justified only upon a showing that the Board in its operation

of its school is depriving pupils of rights guaranteed by the federal constitution."

Petitioners' position in this matter is grounded upon the assertion that the court of appeals misconceived the obligation of the lower federal courts created by the **Brown** decisions to retain school desegregation cases on their dockets. Indeed this Court did say in **Brown v. Board of Education,** 349 U. S. 294, 301:

"During this period of transition, the courts will retain jurisdiction of these cases."

The Court obviously had reference to the five consolidated cases then before it, but the lower federal courts have taken this language to require that other school desegregation cases be retained on the district court docket where injunctive relief has been granted to insure that the terms of the injunction are carried out. As a result there are several hundred such cases now pending in the district courts, and many have been on those dockets for several years.

On the other hand, the **Brown** decisions cannot fairly be read to support the assertion that in any case having any relationship to school desegregation, however remote, the district court is obligated to retain the suit on its docket *ad infinitum*. If this substantial class of cases were exempt from dismissal, when dismissal is the adjudication dictated by traditional legal and equitable rules, the obvious result would be an intolerable financial burden on the litigants of being in court forever and a significant reduction in the authority of the district courts to effectuate an orderly management of their dockets.

Of course, the quoted language in **Brown** was not intended to produce such absurd results. It implied no more than that these cases would be retained on the district court dockets for so long as the circumstances in each case

indicated a need for judicial supervision of the desegregation process. In cases such as the one at bar where the circumstances make appropriate a final judgment then the **Brown** language does not inhibit such disposition. It must be remembered that in this case the lower courts expressly found that respondents were proceeding in good faith to administer a desegregation plan that met constitutional standards and which was voluntarily adopted before the filing of the suit. The proof showed that they were already voluntarily discharging their constitutional obligations and manifesting the intention to continue to do so. In view of this the district court concluded: "It is obviously not the purpose of an injunction to order someone to do something he is already doing * * *" (A. 25). This is so well supported by both logic and precedent that it is not fairly debatable.

It is a basic principle in our jurisprudence that "Public policy dictates that there be an end of litigation;" **Baldwin v. Iowa State Traveling Men's Asso.**, 283 U. S. 522, 525. This principle is certainly applicable to cases related to school desegregation, involving as they do the diversion of funds and energies intended for the education of our children and the perpetuation of community discord that necessarily flows from the long-continued pendency of these suits.

The court of appeals that heard this case suffers from no misconception about the obligation of the district courts to retain jurisdiction in these cases when such a course would serve the interests of justice under the circumstances. It has frequently reversed district court decisions dismissing these cases and directed that the cases be restored to the district court dockets, the most recent such decision being **Yarbrough v. Hulbert-West Memphis School District**, 380 F. 2d 962 (8 Cir., 1967).

However, where the parties have joined issue by their pleadings and their proof, and where after a full trial

the district court has decided that the evidence does not entitle plaintiffs to any judicial relief on those issues, it would be absurd to require that the case be retained on the docket simply because it had something to do with school desegregation and there was the speculative possibility that some different issue might arise between the parties in the future. The doors of the district courts remain open to adjudicate such future controversies, if and when they arise, in fresh litigation.

II.

Respondents' Freedom of Choice Plan for School Assignment Satisfies Constitutional Standards.

By their Question No. 2 petitioners seek to test the constitutional sufficiency of respondents' freedom of choice assignment method to satisfy the mandate of **Brown**. We have already pointed out in the Statement herein that this Court is being asked to review an issue that was not tried in the district court, and which the court of appeals declined to review because it was raised for the first time on appeal.

The record contains no facts pertaining to the operation of respondents' desegregation plan subsequent to the trial in November, 1965, and therefore provides no basis to test the adequacy of the plan in practical operation. The only question that could be decided on the record is whether the plan was sufficient in 1965 in its initial application.

Petitioners assert in their Question No. 2 that there "is a feasible alternative assignment method"; but the record is barren of any proof that the scheme for reorganization of the school district and redistribution of the students that they propose in this Court is educationally or physically feasible or even possible. In short,

this Court is being asked to hear this case de novo, to decide issues not presented to the courts below and which involve facts which are not in the record.

However, from sources outside of the record, petitioners have placed before the Court certain data pertaining to this school district for the 1966-67 and 1967-68 school years. Because of the possibility that the Court may view this evidence to be properly before it we do not confine our discussion to the question of whether the plan was a permissible assignment procedure in 1965. We will discuss, as do petitioners, the question of whether a freedom of choice method of student assignment is constitutionally permissible if the choices made pursuant to it do not result in some sort of balance in the racial composition in each school.

A. This Court Has Not Construed the Constitution to Impose the Duty on School Officials to Affirmatively Mix the Races in the Public Schools.

In **Brown v. Board of Education,** 349 U. S. 294, 298, this Court characterized its holding in the decisions rendered a year earlier (347 U. S. 483) in this language:

> "The opinions of that date, declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference."

Thus it is discriminatory classification by a state agency based on race that is condemned. There is no suggestion of a duty to affirmatively mix the races. This is confirmed by the direction given to the lower courts in remanding the cases. The Court directed at 349 U. S. 294, 301 that decrees be entered requiring the school authorities

> "* * * to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."

It was not directed that they be admitted to schools which, by design or manipulation of assignments, contained students of another race.

The Court had before it in **Brown** the express question of whether its constitutional holding required a decree fixing geographic zoning as the sole lawful method of affording Negro students the rights it had concluded they possessed. In **Brown I** the Court expressly called for further argument and briefing on the question, in light of its decision therein announced:

> "(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, * * *."

Of course, in **Brown II** it did not adopt the view that vindication of constitutional rights required that school assignments be made solely on a geographic basis. It left to local school authorities the flexibility of fashioning the methods by which the transition would be made from imposed segregation to "a system of determining admission to the public schools on a nonracial basis . . ." 349 U. S. 294, 300. The negative terms selected by the Court, "racially nondiscriminatory" and "nonracial", imply no affirmative duty to devise a system to produce maximum racial mixing or balance in the schools. Race was simply forbidden as a criterion in making school assignments.

A review of the arguments and briefs, as well as the Court's opinions, in **Brown**, reveals that no one connected with those cases was advocating the position that the Constitution required mixing of the races in the public schools. To the contrary, the claim was that the Fourteenth Amendment prohibited state-imposed racial classification for school assignment, but did not otherwise restrict the discretion of the local authorities respecting the assignment procedures they adopted. Mr. Justice Mar-

shall, arguing at the bar of this Court in 1952 on behalf of the appellants in the case from South Carolina, made this perfectly clear.[7]

The precision of the Court's language, viewed in light of the acknowledged necessity that the decision be framed in terms of "fastidious accuracy"[8] simply leaves no room for argument that the Court intended something different from what it said, i. e., that race was not a constitutionally permissible basis for classification in the public schools. There is no ambiguity in the **Brown** decisions to justify the conclusions of those writers, speculating about what the Court "really intended", that the decisions meant that the Constitution required integration of the races in the public schools by whatever means and methods that may be necessary to accomplish it.

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[7] Argument on December 9, 1952 in No. 101, October Term, 1952:

> Mr. Marshall: "But if this Court would reverse and the case would be sent back, we are not asking for affirmative relief. That will not put anybody in any school. The only thing that we ask for is that the state-imposed racial segregation be taken off, and to leave the county school board, the county people, the district people, to work out their own solution of the problem to assign children on any reasonable basis they want to assign them on." pp. 23-4.
>
> Mr. Marshall: "But my emphasis is that all we are asking for is to take off this state-imposed segregation. It is the state-imposed part of it that affects the individual children." p. 28.

All references herein to the arguments in the **Brown** cases are to the Transcripts of Ward & Paul contained in the Library of this Court.

[8] Argument on April 12, 1955 in Nos. 2 and 3, October Term, 1954.

During the course of arguments expressly dealing with the terms of the remedy to be contained in the Court's mandate, Mr. Justice Frankfurter observed:

> Justice Frankfurter: "I am sure you will agree in this kind of litigation, it is of the utmost importance to use language of fastidious accuracy?"
>
> Mr. Marshall: "Absolutely, we agree with you fully."

Three years after **Brown II** the Court again chose precise language to characterize its earlier decision. In **Cooper v. Aaron**, 358 U. S. 1, 5, it said:

> "On May 17, 1954, this Court decided that **enforced** racial segregation in the public schools of a state is a denial of the equal protection of the laws enjoined by the Fourteenth Amendment" (emphasis supplied).

With the holding of **Brown** so stated the Court expressly reaffirmed its unanimous adherence to that decision, the occasion to do so being the addition of three Justices to the Court since it was decided.

No subsequent decision of this Court indicates that **Brown** intended to condemn anything except state enforced racial segregation in the schools. See **Goss v. Board of Education**, 373 U. S. 683; **Griffin v. School Bd. of Prince Edward County**, 377 U. S. 218; and **Calhoun v. Latimer**, 377 U. S. 263. Indeed, **Goss** strongly suggests recognition of the validity of an unrestricted freedom of choice assignment method, without reference to the resulting racial composition in the various schools, and **Calhoun** was remanded for proceedings to determine whether a free transfer plan adopted subsequent to trial would constitutionally validate Atlanta's desegregation procedure, again without reference to the racial distribution of students that it produced.

B. **The Better Reasoned Decisions of Other Courts Reject the Proposition That the Constitution Requires Affirmative Action by School Authorities to Mix or Balance the Races in the Public Schools.**

Petitioners repeatedly assert that the constitutional duty of local school authorities is to "disestablish the dual school system." The test they urge to measure whether a school system is being operated on a constitutionally permissible basis is whether schools are "identifi-

able as being for Negroes or for whites." Petitioners' brief, p. 13. This is the common theme advanced by petitioners in this case and the other two cases with which it has been set for argument.[9]

It is not enough, they insist, that every student in these school districts has been assigned to school by a procedure in which the school authorities have given no weight or effect to his race. Race, as a criterion for school assignment, has been abandoned by each of these three school districts in obedience to **Brown** and the Civil Rights Act of 1964. In none of these three cases is there any serious claim that the school assignment plan was not fairly administered or that there is any coercion or intimidation of Negroes in the exercise of their rights under the assignment plans. The feature common to the three cases that petitioners claim to be constitutionally objectionable is the existence of one or more all-Negro schools in each of these districts.[10]

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[9] **Green v. County School Board**, No. 695 and **Monroe v. Board of Commissioners**, No. 740.

[10] The Solicitor General, in his brief amicus curiae, also would measure the constitutionality of a student assignment procedure by whether or not it produced commingling of the races at each school. At page 10 it is stressed that the existence of the all-Negro schools in these districts is "the situation that most concerns us". There apparently has been a fundamental change in the views of the Department of Justice on the question of whether there must be commingling of the races to satisfy the Constitution since the Attorney General, in his brief for the United States as amicus curiae filed December 3, 1952 in **Brown**, advised this Court at page 23:

> "In the **Plessy** case the view was expressed (p. 551) that the alternative to racial segregation compelled by law is 'an enforced commingling' of white and colored persons. This observation, apart from its irrelevance to the constitutional issue, is a plain *non sequitur*. Segregation imposed by law is an interference with the right of an individual to exercise a voluntary choice as to those with whom he will associate. To remove such an interference is to enlarge individual freedom, not to limit it. 'Commingling' between white and colored persons can then re-

Stripped of the semantic gloss produced by such terms as "racial balance", "disestablishment of segregation", "de facto and de jure", and "racial identifiability of schools", the attack here is directed against the authority of any public school system to permit a school attended solely by Negroes to exist.

We must, therefore, examine the question of whether the Fourteenth Amendment prohibits the existence of an all-Negro school. The Amendment by its terms does not purport to deal with the subject, and this Court has never held that the Constitution proscribes the maintenance of an all-Negro school. However, the assertion that the all-Negro school is unconstitutional and that the only remedy is to require affirmative racial mixing in **every** school has received much attention from the lower federal courts since **Brown.**

The three-judge district courts to which two of the cases before this Court in **Brown** were remanded had occasion to deal with this argument shortly after **Brown II.** In **Brown v. Board of Education,** 139 F. Supp. 468 (D. C. Kan. 1955), the objection was raised that all-Negro schools continued to exist. The court said:

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sult as the product of voluntary choice, not of legal coercion. Cf. **McLaurin v. Oklahoma State Regents,** 339 U. S. 637, 641-42.

The citation to **McLaurin** is an appropriate one for there the Court said at pages 641-2:

> "There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. Shelley v. Kraemer, 334 U. S. 1, 13, 14, 92 L. ed. 1161, 1181, 68 S. Ct. 836, 3 ALR 2d 441 (1948). The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits."

> "It was stressed at the hearing that such schools as Buchanan are all-colored schools and that in them is no intermingling of colored and white children. Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color." 132 F. Supp. at 470.

The three-judge court in **Briggs v. Elliott,** 132 F. Supp. 776 (E. D. S. C. 1955), made the same analysis. Speaking for the court Judge Parker referred to this Court's decision in **Brown** and said:

> "It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. * * * If the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation." 132 F. Supp. 776, 777.

This view has been approved and adopted by the court of appeals of every circuit where there has been significant litigation pertaining to school desegregation. In **Springfield School Committee v. Barksdale,** 348 F. 2d 261 (1 Cir., 1965), the court said, referring to the opinion of the district judge it was reversing:

"Certain statements in the opinion, notably that 'there must be no segregated schools,' suggest an absolute right in the plaintiffs to have what the court found to be 'tantamount to segregation' removed at all costs. We can accept no such constitutional right." 348 F. 2d at 264.

The Fourth Circuit has repeatedly embraced the **Briggs** principle. See **Jeffers v. Whitley**, 309 F. 2d 621, 627 (4 Cir., 1962); **Bradley v. School Board of City of Richmond**, 317 F. 2d 429, 438 (4 Cir., 1963), **rev'd on other grounds** 382 U. S. 103; **Swann v. Charlotte-Mecklenburg Board of Education**, 369 F. 2d 29 (4 Cir. 1966);[11] and **Bowman v. County School Board**, 382 F. 2d 326 (4 Cir., 1967).

The Fifth Circuit Court said in **Avery v. Wichita Independent School District**, 241 F. 2d 230, 233 (5 Cir., 1957):

"The Constitution as construed in the School Segregation Cases, Brown v. Board of Education (citation), and Bolling v. Sharpe (citation), forbids any state action requiring segregation of children in public schools solely on account of race; it does not, however, require actual integration of the races. As was well said in Briggs v. Elliott, * * *."

The court then proceeds to quote Judge Parker's language from that decision. Again in **Borders v. Rippy**, 247 F. 2d 268, 271 (5 Cir., 1957), that court said:

"The equal protection and due process clauses of the Fourteenth Amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools."

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[11] In **Swann** the court said: "Whatever the Board may do in response to its own initiative or that of the community, we have held that there is no constitutional requirement that it act with the conscious purpose of achieving the maximum mixture of races in the school population." 369 F. 2d at 32.

The Courts of Appeals for the Sixth, Seventh, Eighth and Tenth Circuits expressed the same views. **Deal v. Cincinnati Board of Education**, 369 F. 2d 55 (6 Cir., 1966), **cert. denied**, 389 U. S. 846;[12] **Bell v. School City of Gary**, 324 F. 2d 209 (7 Cir., 1963),[13] **cert. denied**, 377 U. S. 924; **Clark v. Board of Education**, 369 F. 2d 661 (8 Cir., 1966), **on rehearing** 374 F. 2d 569 (8 Cir., 1967);[14] and

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[12] The court rejected the argument that school authorities had an affirmative duty to overcome racial imbalance in this language:

> "We hold that there is no constitutional duty on the part of the Board to bus Negro or white children out of their neighborhoods or to transfer classes for the sole purpose of alleviating racial imbalance that it did not cause, nor is there a like duty to select new school sites solely in furtherance of such purpose." 369 F. 2d at 61.

[13] "Plaintiffs are unable to point to any court decision which has laid down the principle which justifies their claim that there is an affirmative duty on the Gary School System to recast or realign school districts or areas for the purpose of mixing or blending Negroes and whites in a particular school." 324 F. 2d at 212.

[14] "Though the Board has a positive duty to initiate a plan of desegregation, the constitutionality of that plan does not necessarily depend upon favorable statistics indicating positive integration of the races. The Constitution prohibits segregation of the races, the operation of a school system with dual attendance zones based upon race, and assignment of students on the basis of race to particular schools. If all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the school board, it cannot be said that the state is segregating the races, operating a school with dual attendance areas or considering race in the assignment of students to their classrooms. We find no unlawful discrimination in the giving of students a free choice of schools. The system is not subject to constitutional objections simply because large segments of whites and Negroes choose to continue attending their familiar schools. It is true that statistics on actual integration may tend to prove that an otherwise constitutional system is not being constitutionally operated. However, these statistics certainly do not conclusively prove the unconstitutionality of the system itself." 369 F. 2d at 666.

Downs v. Board of Education of Kansas City, 336 F. 2d 988 (10 Cir., 1964),[15] **cert. denied**, 380 U. S. 914.

Agreement that the Fourteenth Amendment did not command purposeful mixing of the races in the public schools continued to be virtually universal until **United States v. Jefferson County Board of Education**, 372 F. 2d 836 (5 Cir., 1966), **on rehearing en banc** 380 F. 2d 385 (5 Cir., 1967), **cert. denied** 389 U. S. 840. A divided panel of that court observed:

> "As we see it, the law imposes an absolute duty to desegregate, that is, disestablish segregation. And an absolute duty to integrate, in the sense that a disproportionate concentration of Negroes in certain schools cannot be ignored; racial mixing of students is a high priority educational goal." 372 F. 2d at 846-847 n. 5.

The two judge majority then concluded that the freedom of choice method was not a constitutionally permissible school assignment procedure because it did not insure substantial mixture of the races in each school.[16] The protest that the means it mandated to achieve what it considered to be an educationally desirable goal consist-

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[15] "Appellants also contend that even though the Board may not be pursuing a policy of intentional segregation, there is still segregation in fact in the school system and under the principles of Brown v. Board of Education, supra, the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. While there seems to be authority to support that contention, the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend school with them." 336 F. 2d at 998.

[16] "If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom of choice plan, * * * Freedom of choice is not a key that opens all doors to equal educational opportunities." 372 F. 2d at 895-6.

ently had been held to violate the Constitution gave the court little difficulty. It noted that this was 1966 and a remedy to comply with **Brown** now, molded to fit contemporary educational, social and political circumstances, must be substituted for the remedy (measured by the requirements of the Constitution) so carefully framed by this Court in 1955.[17]

This decision was confirmed on rehearing **en banc** by a court divided eight to four. 380 F. 2d 385 (5 Cir., 1967). Thus for the first time a federal appellate court construes the negative prohibitions of the Fourteenth Amendment against discriminatory racial classifications to constitute affirmative commands to mix the races.[18]

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[17] "If this process be 'integration' according to the 1955 **Briggs** court, so be it. In 1966 this remedy is the relief commanded by **Brown**, the Constitution, the Past, the Present, and the wavy fore-image of the Future." 372 F. 2d at 878. The policy of neutrality that the State is required to maintain in matters concerning race is obviously violated by the affirmative action to achieve racial mixtures of school students required by this decision. See **Evans v. Newton**, 382 U. S. 296, 299, where the Court said:

> "But a municipal golf course that serves only one race is state activity indicating a preference on a matter as to which the State must be neutral."

[18] Neither **Taylor v. Board of Education of New Rochelle**, 294 F. 2d 36 (2 Cir., 1961), nor **Board of Education of Oklahoma City v. Dowell**, 375 F. 2d 158 (10 Cir., 1967), lend any support to the **Jefferson County** decision. **Taylor** involved devising an equitable remedy to circumvent school zone boundaries that were proven to have been deliberately gerrymandered by the school authorities, and the remedy fashioned was freedom of choice imposed on the geographic zones. In the Oklahoma City case the court distinguished **Downs v. Board of Education**, 336 F. 2d 988 (10 Cir., 1964), on the ground that the Oklahoma City school authorities were found to be in bad faith in carrying out the district court's orders. The court was careful to say:

> "It is still the rule in this Circuit and elsewhere that neighborhood school attendance policies, when impartially maintained and administered, do not violate any fundamental Constitutional principle or deprive certain classes of individuals of their Constitutional rights." 375 F. 2d at 166.

Other courts have shown little inclination to endorse the rationale of **Jefferson County**. The two concurring judges accepted it in **Bowman v. County School Board,** 382 F. 2d 326 (4 Cir., 1967), but the balance of the court sitting *en banc* rejected it. Panels of the Eighth Circuit Court seem to have accepted at least some of its underlying philosophy. **Kelley v. Altheimer,** 378 F. 2d 483 (8 Cir., 1967); and **Kemp v. Beasley,** ... F. 2d ... (8 Cir., 1968). However, other panels of that court have expressly rejected the decision (**Clark v. Board of Education,** 374 F. 2d 569, 571 (8 Cir., 1967)), or have done so by implication (**Yarbrough v. Hulbert-West Memphis School District,** 380 F. 2d 962 (8 Cir., 1967)). The Sixth Circuit Court has carefully pointed out the basic error of **Jefferson County** and has expressly declined to follow it. **Monroe v. Board of Commissioners,** 380 F. 2d 955, 958 (6 Cir., 1967).

A district court in the Fifth Circuit, and as such responsible to the court that decided **Jefferson County,** has made a perceptive analysis of the forces that result in judicial decisions purportedly grounded on the Constitution but in fact resting on social and political philosophy. Referring to **Jefferson County** and **Hobson v. Hansen,** 269 F. Supp. 401 (D. C. D. C. 1967), Judge Frederick Heebe describes one of the features that characterizes such decisions as:

> "* * * an attempt by civic and social-minded judges to add legal precepts to the force of moral, social and political principles in the effort of the responsible sectors of our society to eradicate the divisive and ruinous prejudices between the citizens of this nation. Both tendencies are laudable. But the end does not necessarily justify the means. *De jure* segregation can be eradicated without ordering a wholesale mixing of the races and making that order a principle of constitutional law. And prejudices can be eroded and this nation united without dispensing

with the legal and constitutional philosophy which is our unique and precious inheritance."

Moses v. Washington Parish School Board, 276 F. Supp. 834, 846-847 (D. C. La., 1967).

While the courts, and ultimately this Court, are the final arbiters of what the Constitution requires, there are persons whose positions and experience in non-judicial capacities entitles their judgments in this matter to at least some weight. No lesser champion of the rights of minority groups than the Vice-President of the United States has written:

> "To use fixed racial quotas in the assignment of students, as is now being tried in some metropolitan centers, does not appear a sound and workable solution. In assigning students on the basis of such quotas, the constitutional principle that race is not a legitimate factor for determining school assignment is actually being violated. The Constitution is color-blind; it should no more be violated to attempt integration than to preserve segregation."[19]

Dr. James Bryant Conant, whose earlier work, **The American High School Today**, is cited by petitioners as "the most important study of secondary education that has been made in this country" (Petitioner's brief, p. 26) has made the same analysis of the Constitution and of **Brown**, and urges that from an educational point of view more progress can be made by improving the all-Negro school than by manipulation to place Negroes in predominantly white schools.[20]

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[19] Hubert H. Humphrey, **Integration vs. Segregation**, Thomas Y. Crowell Company, New York (1964), p. 3.

[20] James Bryant Conant, **Slums and Suburbs**, McGraw-Hill Book Co., New York (1961), pp. 38-41:

> "In concluding this chapter, I should like to turn to a thorny subject of great concern to those interested in im-

With commendable candor the principal counsel for petitioners in each of these three cases has agreed that the Constitution does not condemn the all-Negro school:

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proving Negro education. This is the question of whether or not de facto segregation, as some like to call it, is detrimental to the education of the Negro. Closely related is a second question; namely, should the school authorities endeavor to move Negro children into purely white schools in order to have as many mixed schools as possible? The issue is a very real one, and in a sense it is primarily political. At this point I must make reference to the Supreme Court decisions of 1954 and 1955 because of a tendency to regard them not only as the law of the land but as a sacred text on education. Clearly even a unanimous opinion of the Supreme Court fails to determine educational policy except within the framework set by the issues before the Court—in this case, the 'segregation of children in public schools solely on the basis of race.' It is necessary to point out this obvious fact, for I have heard the statement made that because the Supreme Court expressed the opinion that 'Separate educational facilities are inherently unequal,' all completely Negro schools are morally wrong and that there is essentially no difference between de jure segregation still found in almost all Southern communities (1961) and what some call de facto segregation in portions of the large Northern cities. The point is important and deserves discussion.

"If one turns to the Supreme Court decision in the case of Brown et al. v. Board of Education of Topeka (347 U. S. 483 (1954)), one finds the sentence I have just quoted about separate educational facilities. Taken out of context, the conclusion might be drawn that the justices declared separate educational facilities for whatever reason provided are morally wrong and if supported by tax funds are illegal. Yet on reading carefully the whole opinion, I think the key sentence is the question defined by the Court: 'Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.' I have emphasized the word 'solely', as I presume to think it is the essential word. The justices appear to have expressed no view as to whether the pupils in a completely Negro school are deprived of equal educational opportunity if they are not assigned solely because of their race.

* * * * * * * *

"In some cities, political leaders have attempted to put pressure on the school authorities to have Negro children

"Moreover, the jury discrimination precedents may be recalled: Bias may be presumed from a consistently segregated result; a token number of Negroes may be legally equivalent to none. If, however, in education there were complete freedom of choice, or geographical zoning, or any other nonracial standard, and all Negroes still ended up in certain schools, there would seem to be no constitutional objection."

Jack Greenberg, **Race Relations and American Law**, Columbia University Press, New York (1959), pp. 239-40.

C. The Civil Rights Act of 1964 Adopts as National Policy Prohibition of the Use of Race as a Criterion for School Assignment, and This Prohibition Includes the Use of Racial Classifications for the Purpose of Eliminating Racial Imbalances.

Congress spelled out the national policy pertaining to racial considerations in public school assignment in unambiguous terms in the Civil Rights Act of 1964. In the subchapter dealing with public education it provided:

"'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." 78 Stat. 246, 42 U. S. C., § 2000-c(b) (1964).

The language could not be more clear. The public policy of the nation is that students must be assigned to the

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attend essentially white schools. In my judgment the cities in which the authorities have yielded to this pressure are on the wrong track. Those which have not done so, like Chicago, are more likely to make progress in improving Negro education. It is my belief that satisfactory education can be provided in an all-Negro school through the expenditure of more money for needed staff and facilities."

public schools on non-racial criteria, but school authorities are not to be required to manipulate assignments to achieve racial balances.

Title IV of the Act confers authority on the Attorney General to initiate civil suits to "further the orderly achievement of desegregation in public education", subject to this provision:

> "* * * provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." 78 Stat. 248, 42 U. S. C., 2000c-6 (1964).

The legislative history establishes beyond doubt that it was the intention of Congress to adopt, and thus confirm as the national policy, Judge Beamer's interpretation of the Constitution in **Bell v. School City of Gary, Ind.**, 213 F. Supp. 819 (N. D. Ind.), **aff'd.** 324 F. 2d 209 (7 Cir., 1963), **cert. denied**, 377 U. S. 924. Senator Humphrey, manager of the Bill in the Senate, made this statement during the debate:

> "Judge Beamer's opinion in the Gary case is significant in this connection. In discussing this case, as we did many times, it was decided to write the thrust of the court's opinion into the proposed substitute." 110 Cong. Rec. 12715.

The "thrust" of the Gary decision was accurately described by Senator Humphrey to be:

> "I should like to make one further reference to the Gary case. This case makes it quite clear that while the Constitution prohibits segregation, it does not re-

quire integration. The busing of children to achieve racial balance would be an act to effect the integration of schools. In fact, if the bill were to compel it, it would be a violation, because it would be handling the matter on the basis of race and we would be transporting children because of race. The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the school systems." 110 Cong. Rec. 12717.

It is interesting to note that the plaintiffs in the Gary case urged that whether a school was "segregated" within the context of the **Brown** decisions should be determined by applying a mathematical formula to the racial composition of the school. One witness they presented was a sociology professor, and he testified that by applying his formula to the Gary schools he concluded that any school with less than 36%, or with more than 72%, Negro students was segregated. Judge Beamer observed that the professor's definition of a segregated school "may be a good sociological definition," but that it was not a good legal one. The court then supplied this definition of a segregated school in the constitutional context:

> "* * * a school which a given student would be otherwise eligible to attend, except for his race or color, or, a school which a student is compelled to attend because of his race or color." 213 F. Supp. 819, 829.

This is the definition of a segregated school that Congress adopted in 1964. There is no such school in any of the school districts now before the Court.

During the debate in the Senate concern was expressed that the provision prohibiting federal officials and courts from issuing any order seeking to achieve racial balance in the schools was in Title IV of the Bill and not in Title VI dealing with public education. Senator Byrd inquired:

Mr. Byrd of West Virginia: Can the Senator from Minnesota assure the Senator from West Virginia that under title VI, school children may not be bused from one end of the community to another end of the community at the taxpayers' expense to relieve so-called racial imbalance in the schools?

Mr. Humphrey: I do.

* * * * * * *

Mr. Byrd of West Virginia: But would the Senator from Minnesota also indicate whether the words "provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance" would preclude the Office of Education, under section 602 or title VI, from establishing a requirement that school boards and school districts shall take action to relieve racial imbalance wherever it may be deemed to exist?

Mr. Humphrey: Yes. I do not believe in duplicity. I believe that if we include the language in title IV, it must apply throughout the act. 110 Cong. Rec. 12715.

Respecting his capacity to speak authoritatively on the intent of the proposed legislation, Senator Humphrey said:

Mr. Humphrey: But I am manager of the bill, and, as a part of the legislative history, that would have some importance. It would not be important because those words came from Senator Humphrey, but it would be important because the Senator from Minnesota is manager of the bill.

The continuing congressional intent that racial imbalance in the public schools was not a matter of federal concern,

and was not to be the criterion by which federal officials measured compliance by school districts with statutory and constitutional standards, is reflected in the 1966 amendments to the Elementary and Secondary Education Act of 1965 when the emphasized language was added:

> "In the administration of this chapter, no department, agency, officer, or employee of the United States shall exercise any direction, supervision, or control over the personnel, curriculum, or program of instruction of any school or school system of any local or State educational agency, **or require the assignment or transportation of students or teachers in order to overcome racial imbalance.**" 80 Stat. 1212, 20 U. S. C. 242 (a) (1965-66 Supp.).

The language and intent of the Civil Rights Act of 1964 demonstrate the basic flaw in the court's reasoning in **Jefferson County.** In the second sentence of that opinion the court lays the foundation upon which it builds its conclusion that an unbroken line of its own decisions must be overruled. At 372 F. 2d 836, 845 Judge Wisdom says:

> "The distinctive feature of these cases, consolidated on appeal, is that they also require us to reexamine school desegregation standards in the light of the Civil Rights Act of 1964 and the Guidelines of the United States Office of Education, Department of Health, Education, and Welfare (HEW)."

Then, although the congressional intent to adopt Judge Beamer's interpretation of the Constitution in the Gary case was clearly manifested, the court erroneously concluded that the Act and the Constitution commanded elimination of racial imbalances. Neither is that court's de facto—de jure rationale supported by the Act. Gary had practiced enforced segregation of the races in its schools until 1949, but this prior unconstitutional conduct

was not held to require a punitive injunction to redistribute the students in order to obtain a racial balance. **Bell v. School City of Gary, Ind.**, *supra*.

The court's reliance on the H. E. W. Guidelines in **Jefferson County** to measure constitutionality of conduct, and petitioners' assertion that they should be accepted by the courts as "minimum standards for court-ordered desegregation plans", makes it necessary to put those regulations in an accurate perspective. The first H. E. W. Guidelines were published in April, 1965, and had a vast and immediate impact on the operations of the public schools in seventeen Southern and border states.[21] Thereafter suits were brought in several district courts to test their validity. It was charged that the Guidelines were invalid on the grounds, *inter alia*, that they were being enforced without the prior approval of the President as required by § 602 of the Civil Rights Act of 1964, and that they were designed to, and in application did, achieve objectives they were in violation of the Act. The major charge in each of these suits was that the Guidelines as drawn and applied were being used as an instrument to require local school authorities to eliminate racial imbalance as a prerequisite to continued eligibility for federal financial assistance.

Notwithstanding the public importance of the issues, the incredible fact is that no court has yet made a final independent assessment of the validity of the Guidelines based on a record made in the usual adversary process.

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[21] Congress subsequently responded to this discriminatory application of federal standards between regions of the nation by providing in the Elementary and Secondary Education Amendments of 1967, with respect to HEW and the United States Office of Education, that:

> "All such rules, regulations, guidelines, interpretations, or orders shall be uniformly applied and enforced throughout the fifty States." 81 Stat. 783.

In **Jefferson County** the question of the validity of the Guidelines had not been before any of the district courts and the court of appeals' evaluation of them was on a record barren of any proof respecting their purpose or their application.[22] Judge Godbold said in his dissent:

> "These Guidelines were not involved in any manner in the cases when litigated in the district courts, and the parties had no opportunity to raise by normal judicial procedures and methods questions of their constitutionality and their consistency with the 1964 Act, to draw the issues and develop evidence thereon." 380 F. 2d 425.

He then observes that it is "especially unfortunate" that the court discussed the constitutionality and validity of the Guidelines since there was pending before a three-judge court in Alabama a case in which these questions had been fully tried, briefed and argued. The "mischief of failure to exercise requisite judicial restraint" (380 F. 2d 426), is demonstrated by the subsequent opinion of the three-judge district court which considered these issues foreclosed to it. **Alabama NAACP State Conference of Branches v. Wallace**, 269 F. Supp. 346 (D. C. M. D. Ala., 1967). Respecting the validity of the Guidelines that court said it was its "clear duty to follow the decision" of its court of appeals, and even if it were not so bound the decision of that court *en banc* "is entitled to such great deference and respect that we would be unwilling to depart from it." 269 F. Supp. 350. It fairly may be inferred from the tone of the district court opinion that

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[22] Judge Bell observed in his dissent: "The court errs in prematurely holding that the guidelines issued by HEW are constitutional and within the scope of the Civil Rights Act of 1964. No guidelines whatever were considered by the district courts. 380 F. 2d at 417.

Judge Coleman states: "Since the HEW guidelines were not the subject of a hearing in the Courts below I do not discuss them here. In my view, they are not now before this Court." 380 F. 2d at 419.

had it been free to make an independent evaluation of the validity of the Guidelines on the record before it the result would have been different.

Other appellate courts have withheld passing on the validity of the Guidelines when that was not an issue that had been developed in the record before the district court. In **Kelley v. Altheimer**, 378 F. 2d 483, 499, 500 (8 Cir., 1967), the court said:

> "To the extent that this opinion may constitute approval of said guidelines, it is not intended to deny a day in court to any person in asserting any individual rights or to the Board of Education in contesting any section of the H. E. W. Guidelines."

Although recognizing that the Guidelines were of questionable validity, the district courts have likewise refrained from passing on their legality when that was not an issue joined by the parties in their pleadings and proof. Thus in **Kelley v. Altheimer**, No. PB 66 C-10 (D. C. E. D., Ark.), Judge Henley makes this observation in his opinion filed June 3, 1966:

> "It seems obvious to the Court that the Commissioner is carrying out a broad program of social welfare in the field of education, involving the granting or withholding of federal funds, and that the ultimate goal which he is seeking to achieve may well go beyond what the Constitution requires.
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> "* * * the Commissioner is clearly going further than the Constitution requires since a reading of the new guidelines discloses that the aim of the Office of Education is to fully integrate public school student bodies and faculties and to eliminate dual school facilities."

If the Guidelines do go further than the Constitution requires with respect to the duties they impose on school

authorities, then they obviously go further than authorized by the Civil Rights Act of 1964.[23] In adopting the Act Congress' manifest intent was to require nothing more or less than obedience to the Constitution.

In addition to the Alabama case, the Guidelines were squarely challenged in two other district courts. In **Lee County School District v. Gardner,** 263 F. Supp. 26 (D. C. S. C., 1967), the court overruled defendants' motion to dismiss grounded on the doctrines of exhaustion of administrative remedies and of sovereign immunity, but withheld decision on the merits until the administrative proceedings under H. E. W. regulations had been completed. No subsequent decision in the case is reported.

In **Dermott Special School District v. Gardner,** ... F. Supp. ... (D. C. E. D., Ark., 1968) the court also overruled the motion to dismiss on the sovereign immunity and exhaustion of administrative remedies grounds. In this case, after a hearing on plaintiff's motion for partial summary judgment declaring the Guidelines invalid and enjoining their enforcement, defendants unilaterally dismissed the administrative proceedings and restored the school district's eligibility for federal financial assistance. Defendants then asserted as an additional ground for dismissal that the case had become moot. The court held that the case was not moot, but declined to decide it on the merits saying:

> "A final disposition of this issue (validity of the Guidelines) at this time would require consideration of some constitutional questions of considerable magnitude. The courts appear to be reluctant to pass on such constitutional issues unless such decisions are

[23] Even petitioners recognize that the duty they argue is imposed on all school authorities which they characterize to be "to disestablish the dual system" involves enforcement of "requirements more stringent than those imposed by the Fourteenth Amendment." Petitioners' brief, p. 21, fn. 10.

> indispensable to a proper disposition of the case. Since defendants have abandoned the challenged course of conduct, i. e., withholding of the funds, the Court feels warranted in deferring judgment on this issue unless or until withholding of such funds be renewed." ... F. Supp. ....

The court did make one finding that sheds some light on the administrative hurdles that school districts have encountered, and which have effectively restrained recourse to the courts to test the Guidelines' validity.

> "In the instant case the administrative proceedings drug on for over a year notwithstanding Plaintiff's repeated efforts to expedite them. Without reciting in detail the unilateral delays in administrative proceedings that resulted from Defendants' actions, as sustained by the evidence and the record, the Court is of the opinion that the administrative remedies made available to the Plaintiff School District were sufficiently inadequate that the doctrine of exhaustion is not applicable in this case." ... F. Supp. ....

Indeed, Commissioner of Education Howe had admitted in testimony before a congressional committee that his office has delayed administrative proceedings so as to keep the school districts from securing judicial review.[24]

While no court has passed on the validity of the Guidelines after a full trial on the merits of the issue (except the three-judge district court in Alabama which considered the issue foreclosed to it), it is interesting to note that a Hearing Examiner before whom the issue had been thoroughly developed during the course of H. E. W. administrative hearings found the Guidelines to be "unlaw-

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[24] Guidelines for School Desegregation, Hearings Before the Special Subcommittee on Civil Rights of the Committee on the Judiciary, House of Representatives, December 14, 15 and 16, 1966. U. S. Government Printing Office (1966), p. 42.

ful requirements" for determining whether the operations of school districts met legal standards.[25]

Moreover, committees of both the House and Senate have reported that the requirements of the Guidelines go beyond the law. In its report on H. E. W. appropriations the House Appropriations Subcommittee said:

> "This appropriation finances the enforcement of the Civil Rights Act with regard to the programs administered by the Department. Testimony before the committee indicated clearly that the Department has gone beyond the law in these enforcement activities and in requirements under the so-called guidelines. The committee cautions that the Department will be expected to administer the law with equal firmness and fairness among all the States." H. R. Rep. No. 271, 90th Cong., 1st Sess. 44 (1967).

The language of the report of the Senate Appropriations Committee was even stronger. It said:

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[25] **In the matter of Calhoun County School District No. 1, et al.,** H. E. W. Docket No. CR-206, CR-207, CR-231 and CR-232, Hearing Examiner Seymour Wenner published his decision on April 19, 1967, saying at page 46:

> "It is evident that the Guidelines are being used as substantive rules and are not 'a mere statement of the enforcement policies of the Commissioner of Education.' Requiring recipients to abide by the Guidelines would be proper if under section 80.4 (c) the Commissioner were authorized to decide cases on an ad hoc case-by-case basis, the only standard being his discretionary determination whether a particular plan is adequate to meet the purpose of the Act. But the Act requires that cases be decided on the basis whether proposals or conduct meet standards prescribed in rules approved by the President. The Commissioner is not authorized to require conformance to rules not approved by the President as the test of compliance. Although the Guidelines were never approved by the President, the Department is using them as if they were proper rules for effectuating the Act. Consequently, they are unlawful requirements."

The decision was reversed by the Commissioner of Education on August 17, 1967.

> "* * * that the revised education guidelines contravene and violate the legislative intent of Congress in the enactment of the Civil Rights Act of 1964." S. Rep. No. 1631. 89th Cong., 2d Sess. 71-73 (1966).

An effort to nullify this expression of legislative intent was defeated on the floor of the Senate. 112 Cong. Rec. 22955-22966, 23316-23321, 23341 (daily ed. Sept. 27, 28, 1966).

We do not argue that this Court should pass on the validity of the Guidelines now. The parties did not join issue and present proof on that question in the district court. We do urge, however, that the legal validity of the Guidelines is subject to sufficient doubt that this Court should not accept these administrative rules[26] as establishing any sort of "minimum standards"[27] for measuring whether school authorities are discharging their constitutional obligations.

D. **The Freedom of Choice Method of School Assignment Violates No Constitutional Rights.**

This Court's approval of free choice assignment procedures is implicit in its language in **Goss v. Board of Education**, 373 U. S. 683, 687:

> "In doing so, we note that if the transfer provisions were made available to all students regardless of their race and regardless as well of the racial com-

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[26] Even the majority in **Jefferson County** recognized that these were nothing more than unilaterally drawn rules prepared under circumstances not calculated to avoid bias or to insure that constitutional and legal rights were protected. It said:

> "The Guidelines have the vices of all administrative policies established unilaterally without a hearing. * * * an agency construction of a statute cannot make the law; it must conform to the law and be reasonable." 372 F. 2d at 857.

[27] Petitioners' brief, p. 19.

position of the school to which he requested transfer we would have an entirely different case. Pupils could then at their option (or that of their parents) choose, entirely free of any imposed racial considerations, to remain in the school of their zone or to transfer to another."

And at pages 688-689:

"This is not to say that appropriate transfer provisions, upon the parents' request, consistent with sound school administration and not based upon any state-imposed racial considerations, would fall. Likewise, we would have a different case here if the transfer provisions were unrestricted, allowing transfers to or from any school regardless of the race of the majority therein."[28]

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[28] The Solicitor General now contends that another assignment procedure must be adopted in this district that will result in both schools being predominantly Negro, but he ignores the forces this would set in motion that would cause both schools to quickly convert to virtually all-Negro. His office was more realistic in its appraisal of practical problems in its brief amicus curiae filed in **Goss**. At page 20 it was noted:

"Given existing conditions, requiring a particular white child who had always lived a sheltered life in a rigidly segregated community suddenly to go to an overwhelmingly Negro school might create problems of adjustment interfering with the individual's educational development. Conversely, forcing a Negro child to break away from his established pattern and attend an all-white school might in some circumstances impair his development. **In our view, the constitutional obligation to desegregate the schools 'with all deliberate speed' does not require blindly forcing white children now to attend overwhelmingly Negro schools or Negro children now to attend overwhelmingly white schools** at the sacrifice of their individual welfare" (Emphasis supplied).

The Solicitor General then argued that a freedom of choice plan was a constitutional assignment procedure which had the particular merit of not requiring any child to attend a school predominantly attended by students of another race, saying at page 36:

"Even more important, there are practical alternatives—which are not based on racial criteria and which do not

The Court's continued approval of the free choice concept was strongly suggested in its remand of **Calhoun v. Latimer**, 377 U. S. 263.

The freedom of choice procedure does not impose a burden on the individuals affected as petitioners argue. Petitioners' brief, p. 30. To the contrary, in the constitutional sense, it preserves and affords full exercise of a right that this Court has held to be secured by both the Fifth and Fourteenth Amendments—the right of the parent to direct the upbringing and education of his children. This right is so indispensable to the maintenance of a free society that this Court has consistently preserved it against persuasive arguments grounded on the State's interest in the education of its children. In **Pierce v. Society of Sisters of Holy Names**, 268 U. S. 510, this Court unanimously struck down a compulsory education law adopted by the voters of Oregon which required all children between specified ages to attend the public schools. It agreed with the judgment of a three-judge district court that as a part of the liberty secured by the Fourteenth Amendment parents had the right to select the institutions and teachers to whom they would entrust the education of their children. This Court said:

> "* * * we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. * * * The fundamental theory of liberty upon which all gov-

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support segregation—for meeting any legitimate educational problems of the children affected. First, the school board might allow any child who so desired to transfer to any school which had available space. This would mean that no child would be required to attend a school overwhelmingly composed of students of another race. * * * And the practicability of this plan is demonstrated by its use in numerous big cities with large Negro populations, such as Louisville and Baltimore."

ernments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U. S. 534-5.

This Court has always rejected as inimical to our traditions every governmental effort to homogenize our children through usurpation of parents' natural rights. In **Meyer v. Nebraska**, 262 U. S. 390, it declared a statute restricting the teaching of foreign languages in the schools to be unconstitutional, saying:

> "The American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted. * * * Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; * * *."
>
> "In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and entrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.
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> "The desire of the legislature to foster a homogenous people with American ideals, prepared readily to understand current discussions of civic matters, is easy to appreciate. * * * But the means adopted,

> we think, exceed the limitations upon the power of the state, and conflict with rights assured to plaintiff in error." 262 U. S. 400, 402.

Those fundamental liberties held to be secure from State interference by virtue of the Fourteenth Amendment in **Pierce** and **Meyer** were held to be also beyond the power of the federal government to impair in **Farrington v. Tokushige**, 273 U. S. 290, by virtue of the due process clause of the Fifth Amendment. Not even Congress can interfere with the right of parents to direct the education of their children. Indeed, Congress scrupulously avoided doing so in the Civil Rights Act of 1964.

A most perceptive analysis of the result, in terms of individual constitutional rights, of striking down state-imposed racial segregation was before the Court during its deliberations in **Brown**. In an *amicus curiae* brief filed on behalf of the Congress of Industrial Organizations, Arthur J. Goldberg (later Associate Justice of this Court) argued that state-mandated racial separation should be declared unconstitutional in order to secure to each individual the greatest freedom of choice, which included the right to choose racial separation. The position of the C. I. O. was stated at page 1:

> "This brief *amicus curiae* is submitted by the Congress of Industrial Organizations with the consent of the parties. The CIO is an organization dedicated to the maintenance and extension of our democratic rights and civil liberties and therefore has a deep interest in the elimination of segregation and discrimination from every phase of American life. * * *"

At page 8, *et seq.*, Mr. Goldberg expounds this position:

> "* * * The essence of the whole segregation controversy lies in the distinction between a provision of law **permitting** individuals to separate themselves ac-

cording to race and a provision **requiring** them so to separate. As we pointed out in the **Sweatt** and **McLaurin** cases, it is this important distinction which the Court itself ignored in **Plessy v. Ferguson.** A law permitting individuals to separate themselves according to race permits individuals to exercise their own freedom of choice, to respond in whatever way their prejudices or lack of prejudices may impel them. To require individuals so to separate permits no such choice. Prejudice is imposed by the constituted authority of the state without regard to the preferences of the individual. • • •

"The alternatives are not enforced segregation or enforced commingling. Nor is the question whether a law may constitutionally **permit** the separation of the races. The alternative to enforced segregation is freedom of choice and the question is whether a state may deny that freedom to individuals and require them, willy-nilly, to separate according to race.

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". . . These general concepts—that permissive separation is not the same as compulsory segregation and that the constitutional evil in all these cases is not the separation of the races but the denial to the individual of his right to choose to be separate or not—may, perhaps, be usefully applied in dealing with the particular kind of segregation problem here presented, viz.: public school education.

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". . . There is nothing which requires a state to compel attendance by each pupil at a specific school. In many communities it is customary to permit individual students, or their parents, to exercise a choice concerning the particular school which they will attend. That in fact, is the pattern in the Topeka case now before the Court (R. 245). The fact that the

state compels children to go to school, in other words, need not necessarily mean that it must deny to them a choice of schools. It is possible, in the words of the testimony in the **Briggs** case, that this matter can 'be settled on a voluntary basis.' The appellants do not here complain that the state should compel Negroes to attend white schools. They complain only that it forbids those Negrose who want to attend the white schools from doing so. It may very well be true that most Negroes, if given a choice, will continue to attend schools which are predominantly attended by Negroes and that very few would choose to attend the predominantly white schools. But this lends no support whatsoever to the action of the state in denying to the Negroes the opportunity so to choose.

"We do not mean, be it understood, that there is anything in the 14th Amendment which makes it mandatory that pupils be given a choice of school. We only mean that the elimination of compulsory segregation is not the same thing as compulsory attendance of whites at Negro schools, or Negroes at white schools, because the states can, wherever they now compel separation, offer separation on a voluntary basis. Even compulsory attendance at particular schools based on residential districting rests ultimately on the voluntary choice of residence. Negroes and whites would no more be compelled to attend the same schools under such regulations than were Negroes and whites compelled to live in the same neighborhood when compulsory residential segregation was declared invalid in **Buchanan v. Warley**, 245 U. S. 60."

By the alternative method of school assigment they propose in this case, petitioners would deny to the parents of both Negro and white students the right to select the school their children will attend. They assert that this right must be denied because, when given a choice, most

white children do not choose to attend a predominantly Negro school, and a sufficient number of Negro students choose to attend a school with members of their own race that there continues to be predominantly Negro, or all-Negro, schools. Petitioners' brief, pp. 28-32. The same argument was advanced in **Bradley v. Richmond,** 345 F.2d 310 (4th Cir., 1965), **rev'd on other grounds** 382 U. S. 103, where the court said:

> "* * * the plaintiffs insist that there are a sufficient number of Negro parents who wish their children to attend schools populated entirely, or predominantly, by Negroes to result in the continuance of some schools attended only by Negroes. To that extent, they say that, under any freedom of choice system, the state 'permits' segregation if it does not deprive Negro parents of a right of choice." 345 F. 2d 315-6.

The court's unimpeachable response to this argument was:

> "It has been held again and again, however, that the Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination. Everyone of every race has a right to be free of discrimination by the state by reason of his race. There is nothing in the Constitution which prevents his voluntary association with others of his race or which would strike down any state law which permits such association. The present suggestion that a Negro's right to be free from discrimination requires that the state deprive him of his volition is incongruous." 345 F. 2d 315.

The proposals of petitioners, even when viewed narrowly in terms of protecting the constitutional rights of Negroes only, must be tested in light of the obvious fact that the petitioners in each of these three cases are only nominal parties and that counsel for petitioners who prosecute these suits do not, and cannot, represent or

speak for all Negro citizens in this country. The patterns of voluntary racial association throughout the nation are indisputable proof that there are many Negroes, perhaps the vast majority, who do not want their right to choose to attend a school with members of their own race sacrificed. Certainly this record supports the conclusion that the majority of the Negro patrons of the Gould School District want that right preserved.

This argument that Negro and white parents alike do not know what is best for their children when they choose to send them to schools with members of their own race, and that this Court must therefore adopt a rule of constitutional law that denies them the opportunity to make such a choice, demonstrates its own absurdity. Individual constitutional liberties are not preserved by transferring decisions theretofore belonging to the individual to the school authorities, the courts, or any other governmental agency.

Petitioners do not attack the freedom of choice assignment method *per se*. They argue only that if the exercise of such choices does not result in something approximating the maximum possible intermingling of the races, the Constitution deprives the school authorities of the discretion to use this assignment method and requires that they select another method that may produce a greater racial mixture. This assertion rests on the unsound assumption that the Constitution commands maximizing the mixing of the races in the public schools, and that the constitutional rights of students are measured by percentages and mathematical formula.

That only about 13% of the Negro students in this school district chose in 1966-67 to attend the predominantly white school, and about 15% attend there during the current school year (Petitioners' brief, p. 4) proves nothing relevant to constitutional rights. It is a fact so indisputable as to be subject to judicial notice that the American peo-

ple, when left entirely to their own volition and resources, tend to congregate in a multitude of groups. Among the more prominent of these are economic, religious, nationality and racial groupings.

This was confirmed by the Commission on Civil Rights in its Report[29] at page 199:

> "1. Racial Isolation[30] in public schools is intense throughout the United States. In the Nation's metropolitan area, where two-thirds of both the Negro and white population now live, it is most severe. Seventy-five percent of the Negro elementary students in the Nation's cities are in schools with enrollments that are nearly all-Negro (90 per-cent or more Negro), while 83 percent of the White students are in nearly all-white schools. Nearly nine of every 10 Negro elementary students in the cities attend majority-Negro schools.
>
> 2. This high level of racial separation in city schools exists whether the city is large or small, whether the proportion of Negro enrollment is large or small, and whether the city is located North or South."

Thus the proportion of Negro students in the Gould School District electing to attend school with members of their own race is not dissimilar to the proportion that has done so throughout the nation.[31] However, while the re-

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[29] Racial Isolation in the Public Schools, a Report of the United States Commission on Civil Rights, U. S. Government Printing Office (1967).

[30] This term is used by the Commission to describe racial separation without regard to whether it results from voluntary conduct of individuals, fortuitous circumstance, or discriminatory governmental action.

[31] In commenting on the relatively small numbers of Negro students who choose to attend predominantly white schools in northern cities when they are afforded such a choice, Robert

sult is about the same, the methods by which it is reached are not. In this school district to the extent separation of the races exists, it is purely the result of voluntary choice of the individuals concerned. The national result is the product of a complex of forces, but the most important factor underlying them is the natural tendency of racial groups to congregate.

No national law or policy is offended by the voluntary existence of racial groupings. The Court recognized the racial orientation of many private institutions, including schools, in **Evans v. Newton**, 382 U. S. 296, where it said at page 301-2:

> "Golf clubs, social centers, luncheon clubs, schools such as Tuskegee was at least in origin, and other like organizations in the private sector are often racially oriented."

There was no suggestion that this pattern was unlawful or of any governmental concern. Indeed, as Mr. Justice Douglas said in his concurring opinion in **Gibson v. Florida Legislative Investigation Committee**, 372 U. S. 539 at page 549, the people with whom a citizen chooses to associate "are no concern of government."

The Constitution does not prohibit the free choice of individuals and groups to select their associates; it secures their right to do so.

J. Havighurst in **The Public Schools of Chicago**, The Board of Education of the City of Chicago (1964), p. 375, estimates that an open transfer plan in Chicago would result in only 2 or 3 percent of the Negro children transferring to such schools and notes: "In New York where there has been a positive policy to promote permissive transfer, the result has not been striking. Only 6 percent of Negro pupils have transferred, even though their transportation was paid by the Board of Education." Experience in Fort Smith, Arkansas prompted the court to remark in **Rogers v. Paul**, 232 F. Supp. 833, 838 (D. C. W. D. Ark., 1964): "It seems clear that the great majority of pupils, white and Negro, do not desire to attend an integrated school."

E. Manipulations of School Assignments to Achieve Racial Balance Are Self-Defeating and Promote Increased Separation of the Races.

In each of these three cases petitioners offer an alternative assignment method to that selected by the school officials. In each instance the feature that they urge should require the adoption of their alternative is that it would produce a larger degree of racial mixing—a greater racial balance—in the schools. We have already demonstrated that racial balance in the public schools is not constitutionally mandated, and manipulation of assignments in effort to achieve it involve constitutionally prohibited racial classifications. However, we would be derelict if we did not touch upon the practical implications to public education in this country if the petitioners' position were accepted by the Court in these cases.

Experience has proven, even in those areas where dedication to the principles of **Brown** is the most widespread and enthusiastic, that when the proportion of Negro students in a school approaches 50% it tends to convert quickly to an all-Negro school. At page 199 of its Report, the United States Commission on Civil Rights said: "There is evidence to suggest that once a school becomes almost half—or majority—Negro, it tends rapidly to become nearly all-Negro." The obvious precipitating factor of this phenomenon is the withdrawal of white students whose parents change residence to qualify their children for another public school more to their choosing or enter them in private schools. Their motives range from a fear of deterioration in the educational program or an unwillingness to have their child in a school where the dominant culture is different from their own to plain racial hostility. The motives differ, but the same result is produced with unvaried consistency.

In Washington, D. C., where desegregation following **Brown** placed many white students in schools where they

were in a minority, the flight to the suburbs and private schools has left the city with virtually an all-Negro public school system.[32] The same pattern has developed in virtually all of the country's metropolitan areas with substantial Negro populations.[33]

In the southern and border states where there are hundreds of school districts with a majority or substantial minority of Negro students a general flight of white students between school districts, or to private schools, has not yet developed. This is because the freedom of choice assignment procedure adopted by the vast majority of southern school districts[34] has only infrequently

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[32] In **The New Republic**, July 22, 1967, p. 18, Joseph Alsop comments on the impossibility of achieving any sort of racial balance in the Washington schools:

> "In Washington, to begin with, serious school desegregation is such an obvious impossibility that it is plain silly to talk about it. Officially, any school that is more than half Negro is defined as segregated. But in the District of Columbia, the primary and elementary schools are 93 per cent Negro, and even the high schools are pushing up toward 90 percent. Therefore, total, forcible homogenization of the entire school system would still leave Washington with overwhelmingly segregated schools. Indeed, this kind of forcible homogenization would quite certainly result in even greater segregation; for the predictable consequence would be an increase in the Negro percentage in the primary and elementary schools from 93 percent to 98 or 99 percent."

[33] This caveat was contained in **Chicago Public Schools**, Report by the Advisory Panel on Integration of the Public Schools (1964), p. 12:

> "Finally, it cannot be too strongly stressed that programs to effect school integration must reckon with the fact that the white elementary school child is already in the minority in the public schools of Chicago and the time is not far off when the same will be true of the white high school student. Unless the exodus of white population from the public schools and from the City is brought to a halt or reversed, the question of school integration may become simply a theoretical matter, as it is already in the nation's capital. For integration, in fact, cannot be achieved without white students."

[34] Petitioners' brief, p. 28, fn. 16.

resulted in white students being confronted with mandatory assignment to a predominantly Negro school. However, in those instances where this has occurred the result was the same as experienced in the northern cities. For example, the Linwood School District of Jefferson County, Arkansas, is in a county adjacent to that in which the respondent school district is located. During 1966-67 each of its two schools offered grades 1 through 8, and assignment of students was on a freedom of choice basis. At the commencement of the 1967-68 school year grades one through four were consolidated at one school and the other four grades at the other. Official reports filed with H. E. W. reflect that while there were 62 white children enrolled with over 300 Negro students during 1966-67, the number of white children attending school in this district dropped to seven at the commencement of the 1967-68 school year. Review of that school district's records at the time this brief is being prepared reveals[35] that only two white students still attend school in this district.

H. E. W. has been compiling, but has not yet released, statistics that would reflect to what extent this pattern is developing in the southern States as a result of efforts to achieve racially balanced schools to comply with the

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[35] The hollow victories won by H. E. W. mandated efforts to achieve racially balanced schools demonstrate the validity of Judge Prettyman's views that the solution to problems of racial coexistence do not lie in forced association. In **Carr v. Corning**, 182 F. 2d 14, 16 (D. C. Cir., 1950), he said:

> "Since the beginning of human history, no circumstance has given rise to more difficult and delicate problems than has the coexistence of different races in the same area. Centuries of bitter experience in all parts of the world have proved that the problem is insoluble by force of any sort. The same history shows that it is soluble by the patient processes of community experience. Such problems lie naturally in the field of legislation, a method susceptible of experimentation, of development, of adjustment to the current necessities in a variety of community circumstance."

Guidelines. Judge Bell records one other such instance in his dissent in **Jefferson County:**

> "A good example of the problems to be encountered in eliminating the dual school system is to be seen in the Taliaferro County, Georgia, school system. See Turner v. Goolsby, S. D. Ga., 1965, 255 F. Supp. 724, for background. There were only two schools in the system and the board desegregated, effective in September 1966, on the basis of converting the white school into an elementary school and the Negro school into a high school. A perfect racial balance would be accomplished under the plan. In 1965 there were approximately 600 Negro children and 200 white children enrolled in the system. The records of the Georgia State Department of Education as of January 19, 1967, indicate that there are now 527 Negro students enrolled in the Taliaferro County School system and no white students." 380 F. 2d at 416, n. 6.

The procedure that resulted in an abandonment of the public schools by the white patrons in Taliaferro County is precisely the one that petitioners urge to be a "feasible alternative" in the Gould School District. If adopted, each of the two schools would be predominantly Negro if the white children continued to attend them. However, the tragic, but inevitable, fact is that virtually all, if not all, of the white children would be withdrawn from the schools of this district. There is no logic to support the supposition that although white parents in Chicago, Washington and New York will not consign their children to predominantly Negro schools, white parents in Gould, Arkansas would be willing to do so.

We stress that in most instances these parental decisions will not be manifestations of racial prejudice. Desegregation is an accomplished fact in this school district. Every white child in the district is attending an integrated school where Negro students exceed 20% of

the student body. These parents are willing to have their children attend school with Negroes, but they are not willing to expose their children to the consequences of being a minority in a school where the dominant culture is so different from their own. The decisions will be made in terms of each parent's analysis of what is best for his child, and his fervent desire to obtain it.

Consistent with the pattern that has developed over the nation, many white children would be sent to public schools in other districts[36]—in a move that could involve a change of family residence or sending the child to live with relatives or friends for the school year. Others would enter private schools.

All—Negro and white alike—would suffer immeasurable harm. The white students would lose the benefits of public education provided in and by their local community. The complete withdrawal of support of the local schools by the white community would leave the educational system defaulted to the Negroes in circumstances hardly calculated to meet even the most basic educational needs of its students. Although **Griffin v. School Bd. of Prince Edward County**, 377 U. S. 218, would probably result in the maintenance of an educational system of sorts, the white property owners who pay a disproportionate share of the local school taxes could not be expected to continue supporting taxes on their property at annual school elections when their children no longer shared in the benefits of the public school system.[37]

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[36] The racial distribution in Arkansas is fairly typical of that of other states with substantial bi-racial population. There are 171 all-white, 6 all-Negro and 218 bi-racial school districts. Report of Arkansas State Education Commissioner A. W. Ford released October 11, 1967. See Arkansas Gazette, October 12, 1967, p. 4A.

[37] A substantial portion of the operating revenues of the public schools in Arkansas is derived from ad valorem taxes, and the tax rate is annually submitted to the electorate in each district.

Counsel for petitioners whose principal—though misdirected—attack is on the elimination of the all-Negro school would have difficulty demonstrating the fruits of victory to their clients (and the others they purport to represent) when they delivered to them the keys of a school system abandoned by the white citizens.[38]

Translated into national consequences, if this Court should decree that racial balance is the constitutionally mandated pole star that must direct assignment procedures in all school districts, the future of public education in this nation would be in serious jeopardy. This would be the result of placing the imprimatur of the Constitution on the educational theories and sociological experiments that underlie petitioner's position in this Court.

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[38] The impact of withdrawal of white students from the public schools to avoid attendance in predominantly Negro schools is described in an article entitled "New 'Private' Schools Drain Public System" in **The Washington Post**, March 3, 1968, p. B3.

> "The impact of the private schools on public school systems in the South is much broader than simple enrollment figures would indicate. The existence of one private school for middle and upper-income whites in a county or town can cause a slump in support for the public schools throughout the community.
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> "When student enrollment decreases in a school system, per pupil costs rise. In a rural area, even a small drop in enrollment may reduce the amount of state aid for which a school district is eligible while it increases the cost of educating each child.
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> "Surry and Prince Edward Counties in Southside Virginia are extreme examples of what a private school system for whites can do to the public schools. In both counties, virtually all of the students in the public schools are Negro and all of the private school students are white."

Official reports in H. E. W. files reflect that on September 30, 1967 there were 11 white students and 1,612 Negro students in the public schools of Prince Edward County. In private schools were 1,190 white students.

CONCLUSION.

Respondents accept without reservation their obligation to comply with the Constitution as construed in **Brown**, and to exclude no child from any school because of his race as mandated by the Civil Rights Act of 1964. They have challenged customs and traditions that had existed for well over a century by voluntarily making the transition in this school district from a racial to a non-racial assignment procedure. They have succeeded in bringing about this difficult adjustment without destroying the school system. It is respectfully submitted that the Constitution does not require that they now abandon an assignment procedure that assures every child admission to the school of his choice in favor of one that would greatly damage, if not destroy, the public schools of this community.

Respondents respectfully submit that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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